IN THE

Supreme Court of the United States

October Term, 1961
No. 244

DAIRY QUEEN, INC.,
Petitioner

vs.

THE HON. HAROLD K. WOOD, *Judge of the United States District Court of the Eastern District of Pennsylvania*, H. A. MCCULLOUGH and H. F. MCCULLOUGH, *a partnership, doing business as McCullough's Dairy Queen*, and BURTON F. MYERS, ROBERT J. RYDEEN, M. E. MONTGOMERY and LORRAINE DALE, *Executrix of the Estate of Howard E. Dale, Deceased, Individuals*,
Respondents

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondents, in their Brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, appear to have emphasized several collateral items which should not go unanswered.

1. The respondents' charge that "The apparent reason for the Petition for Certiorari is to obtain another delay in the final disposition of this case" appears to be predicated upon the contention Petitioner did not file its Answer containing a demand for a jury trial until approximately two months after the action was commenced. Approximately one-half of the respondents' argument is devoted to this

item. That this charge is unfounded can be demonstrated in brief terms.

McCulloughs' bond in completing the preliminary injunction was filed on January 6, 1961, and petitioner noticed its appeal to the United States Court of Appeals for the Third Circuit from the Order granting the preliminary injunction on January 9, 1961. Petitioner's counsel embarked immediately on arrangements for continuing the proceedings in the court below. It appeared that neither counsel were certain of the effect of the said appeal on the proceedings in the court below, and as a result of a discussion between counsel there was a standstill accord which was confirmed by letter of January 10, 1961, hereto attached as Exhibit "A".

Subsequently, McCulloughs' counsel modified his accord of January 10, 1961, by letter of January 23, 1961, indicating that the situation would be governed by what was determined by applicable legal principles. This letter is attached and marked Exhibit "B".

McCulloughs' counsel continued to urge that the aforesaid appeal prevented any further proceedings below, and on January 24, 1961, there was sent to McCulloughs' counsel a stipulation to that effect. This was returned unsigned on February 1, 1961. Accordingly, counsel for petitioner concluded because of the uncertainty as to the effect of the aforesaid appeal the Answer would be filed during the pendency thereof. This was indicated in a letter of February 6, 1961, hereto attached and marked Exhibit "C".

McCulloughs' counsel raised no objection at any point as to the time within which the Answer was filed. On the contrary, in his Motion to strike the defendant's demand for a trial by jury filed March 9, 1961, he persisted in urging the said appeal prevented the filing of the Answer and stated:

> "The pleading referred to above [defendant's Answer and New Matter] is not and was not properly filed in the District Court, in that when it was filed,

the record in the case had already been transmitted to the United States Court of Appeals for the Third Circuit, and had been there docketed."

2. Petitioner is criticized for its footnote, No. 2 on page 4 of the Petition, which quotes specific language of McCullough not refuted in the respondents' brief. The footnote clearly indicates that the deposition in question was not before the Court of Appeals. It is respectfully submitted, however, that the footnote merely confirms what is evident in the record for the reasons that:

A. The McCulloughs, in their separate and distinct Paragraph 14 of the Complaint (page 16 of Respondents' Brief), aver:

> "Defendant is in default to McCullough's Dairy Queen *under the said contract* 'Exhibit A' in excess of $60,000.00"; (Emphasis supplied)

and

B. In the Memorandum and Order of Judge Wood (page 29 of Respondents' Brief) Judge Wood said:

> "Incidental to this relief, the Complaint also *demands the $60,000.00 now allegedly due and owing plaintiffs under the aforesaid contract.*" (Emphasis supplied)

C. The prayer in the Complaint is to the same effect (page 18 of Respondents' Brief):

> "B. Ordering an accounting to determine the exact *amount of money owing by defendant* to McCullough's Dairy Queen and thereafter entering judgment in favor of McCullough's Dairy Queen and against defendant in such amount." (Emphasis supplied)

3. Petitioner is criticized for the inaccurate transcription of Judge Wood's Opinion (page 2 of Respondents' Brief). It is regrettable that this error occurred, but it

is respectfully submitted that in spite of what was mechanical error there was no change in transmitting the thought expressed by Judge Wood that he might submit to a jury the question of the amount of damages. This question, it is respectfully submitted, is not involved in the issue raised by the Petition for Certiorari.

In conclusion, it might be suggested that McCulloughs' position could be clarified beyond question if they would accept the suggestion heretofore made that there be filed with the Court an amendment to their Complaint omitting their claim for the balance allegedly due under the agreement of October 18, 1949.

Appendix A to the Respondents' Brief was printed by agreement between respective counsel. However, plaintiffs' counsel inadvertently omitted Exhibit "A" to the Complaint, which is the agreement of October 18, 1949. It is printed herein as Appendix D.

Respectfully submitted,

DONALD M. BOWMAN, ESQ.
Attorney for Petitioner

Exhibit A

January 10, 1961

Mark D. Alspach, Esq.
21 S. 12th Street
Philadelphia 7, Penna.

Re: McCULLOUGH *v.* DAIRY QUEEN, INC.

Dear Mark:

As a result of our frank discussion this morning, we appear to be in accord on the following:

A. That the appeal to the Court of Appeals postpones the need for filing an Answer until after the appeal has been disposed of.

B. Nevertheless, if it should be found convenient, an Answer or responsive pleading may be filed.

C. In the event this is done, the Answer shall not be pertinent or relevant to the appeal now pending.

D. In the same way, we shall postpone the taking of depositions until the appeal is disposed of.

With kindest regards, I am

Sincerely yours,

MICHAEL H. EGNAL
ee

Exhibit B

KRUSEN EVANS AND SHAW
21 South Twelfth Street
Philadelphia 7, Pa.

January 23, 1961

McCULLOUGH ET AL. vs. DAIRY QUEEN, INC.

Michael H. Egnal, Esquire
Suite 600 Bankers Securities Bldg.
Philadelphia 7, Pennsylvania

Dear Mr. Egnal:

I regret that the press of certain other matters has prevented my responding to your letter of January 10,1961, at an earlier date.

In view of your having reduced to writing your understanding of the thoughts we had previously exchanged, I find it necessary to state my own understanding of what we discussed.

In the first place, everything I said was understood to have been said without benefit of, or prior necessity for any research. I emphasized that the thoughts I expressed were purely "off the cuff" and were to be so received. I hardly felt it necessary to add that if later developments required or permitted further study of the subjects on my part leading to a different conclusion, I would not be bound by my preliminary ideas; I had assumed that this was understood.

In any event, I tried, but apparently failed to make it clear that I considered the several points mentioned in your letter of January 10, 1961, as primarily matters of law. I also stated that, this being the case, I felt it useless, perhaps presumptuous for any stipulation or agreement

to be reached on these subjects. My expressed feeling was that whatever the cases, and the rules provided or required would be the criterion and that it was not the function or province of counsel to agree to something different.

I did say, and confirm, that, should you decide to file an answer to the complaint at this time, we would not move to strike it on the ground that it had not been filed within twenty days of service pf the complaint. However, I emphasized that it was up to you to decide rather quickly whether an answer should be filed now, and that my position as stated was not to be construed as an indefinite and continuing indulgence in the event your answer is actually due.

To sum it all up, whatever the law is on the points you mentioned, it is, and we shall proceed accordingly. Should the law permit us, and we find it necessary to take any further proceedings of any sort, at any time which we deem necessary in the protection of our clients' interests, we have made no agreement to the contrary.

Sincerely yours,

KRUSEN, EVANS & SHAW
By: s/ MARK D. ALSPACH

Exhibit C

February 6, 1961

Mark D. Alspach, Esq.
21 S. 12th Street
Philadelphia 7, Penna.

Re: McCULLOUGH ET AL. *v.* DAIRY QUEEN, INC.

Dear Mark:

Copy of letter which this day went to the International Printing Co. with reference to the record in the indicated matter is herewith enclosed and acquaints you with the matter that has been ordered printed.

You may note further that Wallace and I have concluded that we will file an Answer to the Complaint and proceed to take the depositions of both McCulloughs. In order to accommodate them as much as possible, would you be good enough to ascertain now when it would be convenient for them to appear in Philadelphia. In this connection I would like to get the specific weeks in which arrangements may be made. May I suggest as an outside date no later than the first week in March.

With kindest regards, I am

Sincerely yours,

MICHAEL H. EGNAL

ee
enclosure
cc: Mr. Carl C. Mohler
Mr. Dean T. Mohler
Mr. Theodore Suppiee
Wallace D. Newcomb, Esq.

Appendix D

FREEZER AND TERRITORY AGREEMENT

This agreement entered into at Moline, Illinois, this 18th day of October, 1949, by and between

H. A. McCULLOUGH *acting for*
H. A. McCULLOUGH, H. F. McCULLOUGH AND J. F. McCULLOUGH UNDER THE NAME AND STYLE OF McCULLOUGHS DAIRY QUEEN

of the City of Geneseo, County of Henry and the State of Illinois, hereinafter referred to as First Party; and

BURTON F. MYERS, ROBERT J. RYDEEN, M. E. MONTGOMERY AND HOWARD DALE
UNDER THE NAME AND STYLE OF DAIRY QUEEN OF PENNSYLVANIA

of the City of St. Paul, County of Ramsey, and the State of Minnesota, hereinafter referred to as Second Party,

WITNESSETH

WHEREAS, First Party has on file with the Department of State of the State of Pennsylvania, the trade-mark "Dairy Queen" as afforded by such registration, which name shall be used only for a frozen dairy product (known as Dairy Queen) within the State of Pennsylvania.

WHEREAS, the Patent on the Freezing and Dispensing Machine is owned by the Ar-Tik Systems, Inc. of Miami, Florida; Patent Number is 2080971; the rights to manufacture, use, sell, and/or Sub-contract to other parties under said Patent, were granted to H. A. McCullough by the Ar-Tik Systems, Inc.

WHEREAS, Second Party desires to acquire from First Party rights to develop certain portions of the State of Pennsylvania and rights to use machines manufactured under Patent Number 2080971, and certain rights to the use of the trade-mark "Dairy Queen" within said certain portions of the State of Pennsylvania as hereinafter provided.

NOW THEREFORE, Second Party being fully advised in the premises hereby offers and upon acceptance hereof by First Party, hereby agrees to do the following:

1. Exclude from this agreement certain areas of Pennsylvania heretofore contracted by First Party to others: County of Allegheny and Cities of Greensburg, Uniontown, Washington, Pottstown, Phoenixville, Bethlehem, West Chester, Coatsville, Norristown, Chester, Reading, Allentown, Easton, and the customary adjacent areas thereto under and for fair trade and competition purposes; and such exclusions shall be recognized throughout this agreement even though, for convenience and brevity, the full name, Pennsylvania, may be used.

2. Take over and conduct the operations of development of the said certain portions of Pennsylvania on October 18, 1949 and thereafter, all at the sole cost, risk, and expense of Second Party.

3. Pay direct, or cause to be paid direct, to Ar-Tik Systems, Inc., 1801 NW 17th Avenue, Miami, Florida, the sum of four cents a gallon on all mix used or sold through any and all Dairy Queen Stores and/or said Freezing and Dispensing Machines operated in Pennsylvania by Second Party and/or their Sub-contractors, from the beginning of operations hereof, in the nature of a royalty regardless of the expiration of patent on said machines. Said payment shall be computed at the end of each month's operation for the total number of gallons of mixes used, and remitted by

the tenth day of the following month. Where powdered or concentrated mixes are used, the payment per gallon shall be based upon their equivalent in liquid mix.

4. Pay direct to McCulloughs Dairy Queen, (name adopted by First Party), successors or assigns, at his office the sum of One Hundred Fifty Thousand and No/100 Dollars ($150,000.00) in cash as follows:

(a) $1,000.00 cash, at once.

(b) $149,000.00 Balance, as soon as possible but payable in not less than the amounts as follows:

1—50% forthwith of all amounts of sales of franchises or Territorial rights made by Second Party under contracts sold by Second Party, and in addition, 50% of the sale value of all said franchise or territorial rights used by Second Party.

2—The aggregate total amount paid to First Party by Second Party under Subsection 1 above, and this Subsection 2 shall be not less than the amount of $18,625.00 in the year ending October 15, 1950, and in each year ending on October 15th thereafter, until the said total amount of $149,000.00 has been fully paid to First Party as provided under this section (b) of paragraph 4.

5. Conform and maintain all store operations, in manner and to extent acceptable by First Party or his agents, in sole discretion and opinion of First Party, to the methods and ethics of other Dairy Queen operators and the general provisions of agreements now in force in other States. Included, not by way of limitation, among the said methods are the keeping of records of all mixes used or sold, furnishing to First Party the name and address of each mix supplier, keeping records of the serial numbers and locations of all machines within the State of Pennsylvania; submitting mix reports to First Party and to Ar-Tik Systems, Inc.,

showing the serial numbers and locations of the machines covered by said reports. Permit free access of First Party, Ar-Tik Systems, Inc., or any person representing them, to such records for the purpose of determining full compliance with the terms of this agreement.

6. Keep and maintain First Party as a free independent contractor having no partnership or similar interest in the business or operations of Second Party or others, and free and harmmless from any and all liability therefrom, including, not by way of limitation, public liability, misdemeanors, legal suits, both domestic and commercial, tax liens of any kind or nature, that Second Party may be liable for.

7. That the Second Party or any others, shall not sell or offer for sale any other frozen or semi-frozen dairy product, use any other type or make of freezer, or sell any of the said machines, move any of the said machines purchased through First Party outside of the State of Pennsylvania for the purpose of operating them, without first obtaining the written consent and approval of the First Party. That two copies of each sub-contract shall be forwarded to the office of First Party within ten days after it is completed and signed.

8. That Second Party shall order through First Party all of said machines needed for said development, at the manufacturers selling price f.o.b. factory. Said prices may vary from time to time dependent upon costs of material and labor. First Party does not guarantee prices, delivery dates, or furnish parts or labor free of charge on the said machines. Second Party shall take up with manufacturer the matter of any necessary adjustments for unsatisfactory or defective parts or machines. First Party or Second Party shall not be required to assume responsibility for defending Patent Number 2080971, as such defense is an obligation of Ar-Tik Systems, Inc.

9. Admit that failure of Second Party to make the payments promptly as required herein and/or any other breach of any of the provisions of this agreement, and declared to Second Party by First Party by thirty days written notice mailed to last known address of Second Party, shall cause any rights of Second Party hereunder to cease and become null and void within said thirty day period, unless default is corrected. It is further understood and agreed that in event this contract is terminated under conditions above described, that rights to all undeveloped territory in the State of Pennsylvaina will revert to First Party and balance of any monies due First Party from the sale of sub-franchises by the Second Party, as herein provided, will remain due and payable to them.

10. That the rights hereunder are granted to the Second Party solely for convenience of the First Party in the development of the Pennsylvania territory and that title to said territory, nevertheless, remains vested with the First Party until released in part under contracts sold by Second Party, but subject, nevertheless, to the terms of this agreement; that performance by the Second Party hereunder shall be satisfactory to First Party in all respects; that the right to use the trade-mark "Dairy Queen" in the State of Pennsylvania is reserved to the First Party except as specifically granted by First Party in separate agreements. First Party shall have the irrevocable power and right to pledge, assign, sell, or otherwise transfer his rights under this agreement over to others with or without notice to Second Party.

11. That the Second Party will have the right to subdivide the State of Pennsylvania, for the purposes of this agreement, from time to time among sub-contractors. Second Party represents that it is possessed of the abilities, knowledge, training, and other requisites for the prompt, continuous, and business-like development of the said territory to the end that full payment shall be made to First

Party hereunder and in accordance with the understanding that time is the essence of this contract and agreement for the express purpose of paying in full the amount owing hereunder the First Party. However, if conditions arise that are beyond the control of the Second Party, such as a major war involving the USA, sickness, or disability, then adjustments or amendments between the parties hereto shall be made to recognize such conditions considered necessary.

12. That the maximum charge to all operators within the State of Pennsylvains for the rights to operate Dairy Queen Machines shall not exceed 29¢ a gallon on all of the mixes used or sold by them, unless and until First Party shall approve a higher charge per gallon.

First Party hereby accepts offer made by Second Party by execution of this agreement and

1. In consideration of $1.00 and other good and valuable considerations, in hand paid each to the other, and the mutual promises herein contained, First Party does hereby:

(a) Convey, transfer, grant, bargain, and sell, for the purposes of this agreement, unto Second Party, the following:

I.

An exclusive right to develop the certain territory of the State of Pennsylvania for the restricted conduct of the operation of Dairy Queen Stores, subject to the provisions of offer of Second Party as contained herein.

This agreement shall be binding upon the legal representatives, heirs, and beneficiaries, successors and assigns of the parties hereto.

If any provision of this agreement or the application thereof to any person or circumstances is held invalid, the remainder of this agreement and application of such pro-

vision to other persons or circumstances shall not be affected thereby.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals, to this instrument on this 18th day of October 1949 at Moline, Illinois.

McCULLOUGH'S DAIRY QUEEN

/s/ H. A. McCULLOUGH
H. A. McCullough
/s/ H. F. McCULLOUGH
H. F. McCullough

DAIRY QUEEN OF PENNSYLVANIA

/s/ BURTON F. MYERS
Burton F. Myers
/s/ M. E. MONTGOMERY
M. E. Montgomery
/s/ ROBERT J. RYDEEN
Robert J. Rydeen
/s/ HOWARD DALE
Howard Dale